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Supreme Court of the United States

OCTOBER TERM, 1962

No. 698

RAYMOND WEITZNER, Administrator
of the Estate of Joe H. Weitzner, Deceased,
LILLIE WEITZNER, RAYMOND WEITZNER,
and VIRGINIA RAIDER,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

RAYMOND WEITZNER, Administrator of the Estate of Joe H. Weitzner, Deceased, LILLIE WEITZNER, RAYMOND WEITZNER, and VIRGINIA RAIDER pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on October 17, 1962.

CITATIONS TO OPINIONS BELOW

The Findings of Fact and Final Decree of the District Court are unreported. They are included in the printed Transcript of Record utilized by the Circuit Court of Appeals, nine copies of which have been filed with this Petition. The opinion of the Court of Appeals printed in Appendix page 3 hereto is reported in 309 F.2d 45.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 17, 1962, and a rehearing was denied on November 19, 1962. The jurisdiction of this Court is invoked under 28 USC Sec. 1254 (1).

QUESTION PRESENTED

Does a wife in Florida have, during the lifetime of her husband, a property right in a homestead where the title is in his name alone?

FLORIDA STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Article X, Sec. 1, Florida Constitution

> A homestead . . . owned by the head of a family . . . shall be exempt from forced sale under process of any court, and the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists.

Article X, Sec. 2, Florida Constitution

> The exemptions provided for in Sec. 1 shall inure to the widow and heirs of the party entitled to such exemption . . .

Article X, Sec. 4, Florida Constitution

> Nothing in this Article shall be construed to prevent the holder of a homestead from alienating his or her homestead so exempted, by deed or mortgage duly executed by himself or herself, and by husband and wife, if such relation exists; nor if the holder be without children to prevent him from disposing of his or her homestead by will in a manner prescribed by law.

Florida Statutes 731.05(1)

> Any property, real or personal, held by any title, legal or equitable, with or without actual seisin, may be devised or bequeathed by will; provided, however, that whenever a person who is head of a family, residing in this state and having a homestead therein, dies and leaves either a widow or lineal descendants or both surviving him, the homestead shall not be the subject of devise, but shall descend as otherwise provided in this law for the descent of homesteads.

Florida Statutes 731.27

> The homestead shall descend as other property; provided, however, that if the decedent is survived by a widow and lineal descendants, the widow shall take a life estate in the homestead, with vested remainder to the lineal descendants in being at the time of the death of the decedent.

Florida Statutes 731.34

> . . . The homestead shall not be included in the property subject to dower but shall descend as otherwise provided by law for the descent of homesteads . . . Whenever the decedent has died intestate leaving no lineal descendants . . . the homestead of the decedent shall descend to her with the exemptions provided by the constitution.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked by Sections 1340 and 1345 of Title 28, United States Code.

The facts are stipulated. By the stipulation it is shown that, on December 12, 1946, Joe H. Weitzner purchased a parcel of land in Dade County, Florida, upon which a dwelling had been erected. He and his wife promptly occupied the property and resided upon it until his death on October 9, 1956. At the time of the purchase and at all times thereafter Weitzner and his wife were the parents of two grown children neither of whom ever

resided upon the property. In January of 1954, federal income tax assessments were made against Joe H. Weitzner in the amount of $125,717.63 for tax deficiencies for 1942 and 1943. A tax lien notice was filed in the office of the Clerk of the Circuit Court of Dade County, Florida, on April 9, 1954. On August 17, 1956, Joe H. Weitzner, without joinder of his wife, executed a deed, without valuable consideration, purporting to convey the property to his wife. The United States brought suit to foreclose its tax lien. Joined as defendants were the widow of Joe H. Weitzner, his two children and the administrator of his estate. It was the contention of the defendants that, although exemptions do not generally preclude the United States from levying upon property for the satisfaction of tax liens, the Florida Constitution and statutes gave to the wife and children of Weitzner, at the time the property was acquired and occupied as homestead, a vested property interest and estate which is separate and apart from the title of the husband. This property interest, the widow and children contend, cannot be attached for obligations which they did not incur and for which they are not liable. The interest of the husband in the property they assert, was not such an interest as could be levied upon and sold separate from the interests of widow and children. The district court held that Weitzner had full property rights in the homestead and the constitutional and statutory restrictions upon his power to convey and devise the homestead property did not prevent the tax lien from attaching nor prevent its foreclosure. The court's decree directed the foreclosure of the tax lien and the sale of the property. The widow, the children and the administrator appealed to the Circuit Court of Appeals.

They then moved the Circuit Court of Appeals to

certify the case to the Supreme Court of Florida under Florida Statute 25.03 and Florida Appellate Rule 4.61. This Motion was carried with the case and denied. Seven months after hearing oral arguments, the Court of Appeals affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The Court should grant this Writ for the following three reasons:

1. The question involves interpretation of Florida property law and should have been certified to the Florida Supreme Court.

2. The decision is in direct conflict with the decision in another Court of Appeals on the same matter.

3. The ruling involves interpretation of Florida property law and is contrary to applicable state law.

ARGUMENT

1. The question involves interpretation of Florida property law and should have been certified to the Florida Supreme Court.

It is clear that rules of property and fixing the incidence of property ownership are rules of state law which the Federal Court will respect, **U. S. v. American National Bank of Jacksonville,** 255 F.2d 504 (5th Cir. 1958) and a wife's property cannot be taken from her to satisfy her husband's tax indebtedness.

Cannon v. Nicholas, 80 F.2d 934 (10th Cir. 1935)

Poe v. Seaborn, 282 US 101, 51 S.Ct. 58, 75 L.Ed. 239 (1930)

The Government must look to the Florida Homestead law for the purpose of determining, according to its tenor, whether a property right is granted to the wife and child for the purpose of ascertaining whether the property it seeks to subjct to the satisfaction of the tax lien is the property of the taxpayer or that of his wife and children.

Jones v. Kemp, 144 F.2d 478 (10th Cir. 1944)

Morgan v. Moynahan, 86 F.Supp. 522 (S. D. Texas 1944)

The Circuit Court of Appeals ignored the authority cited by the District Court and chose to rest its decision that the wife has no property interest on two early Florida cases, **Hinson v. Booth,** 22 So. 687 (Fla. 1897) and **Johns v. Bowden,** 66 So. 155 (Fla. 1914). (These cases constitute the sole authority cited by the encyclopedic reference made by the Court.)

Assuming arguendo that these early cases stand for the proposition for which they are cited, the law of Florida has changed since the time of those decisions. This change was noted in **2 U of Fla. L.Rev. 12,** "Our Legal Chameleon, The Florida Homestead Exemption", by Harold B. Crosby and George John Miller. The article stated at Page 72:

> " . . . Our little chameleon, which less than twenty years before was only a gleam in the eye of our famous justice, has grown from a mere expectancy of exemption, on through the adolescent period of contingent remainder, sometimes in the exemption but gradually in the property, until now **he becomes a full-fledged estate, a sort of vested remainder in the property,** defeasible under certain conditions only . . . " (Emphasis supplied)

Florida cases supporting this contention are set out in Point 3 of this topic.

The Circuit Court of Appeals studied this matter for seven and one-half months after oral argument before rendering its decision. It is difficult to believe that this would have been ncessary unless there was considerable merit to your Petitioners' argument. The application of the Federal Abstention Doctrine would authoritatively put to rest the controlling State law.

United States Pipeline Co. v. Ideal Cement Co., 82 S.Ct. 676 (1962);

Clay v. Sun Insurance, Ltd., 80 S.Ct. 1222 (1960).

2. The decision is in direct conflict with the decision in another Court of Appeals on the same matter.

The finding of the Court that "The requirement for the consent of the wife to the alienation of the homestead does not create or recognize a property interest in her." is in direct conflict with the reasoning of the Tenth Cir-

cuit interpreting Oklahoma law. The case of **Jones v. Kemp,** 144 F.2d 478 (10th Cir. 1944) which is identical with the instant case stated:

> "**Although not an estate,** it (the homestead) is a special and peculiar interest in land belonging to the husband and wife jointly and indivisibly,— **neither may be divested of his or her interest without the consent of both.**" (Emphasis supplied)

Ordinarily, the construction of Oklahoma homestead provisions could not be said to be in conflict with interpretation of Florida homestead provisions but in this case, where the two Circuits have reached diametrically opposed findings on the effect of the necessity of the requirement that the wife join in the conveyance of homestead, such a conflict exists and should be settled by this Court.

3. The ruling involves interpretation of Florida property law and is contrary to applicable state law.

Internal Revenue Code, Section 6321, provides for a lien against all property and rights to property of the taxpayer. The rights of the Government when attempting to establish its lien to property are never better than those which the taxpayer had. **Sec. 54.52, Merten's Law of Federal Income Taxation.**

Property has been defined as follows:

> "While the word 'property', in common use, is applied to the tangible physical thing commonly

> called property, in the law it is not the material object but the right and interest which one has in it, to the exclusion of others, which constitutes property. Property, in a legal sense, consists in the domination which is rightfully and lawfully obtained over a material thing, with the right to its use, enjoyment, and disposition.
>
> The term 'property' has a most extensive signification, and in its strict legal sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects. But the word is often used to indicate the subject of the property or the things owned, as a chattel or a tract of land. These things, however, though the subjects of property, are, when coupled with possession, but the visible manifestations of invisible rights, the evidence of things not seen."

Tatum Bros. Real Estate & Investment Co. v. Watson, 109 So. 623, 626, (Fla. 1926).

The taxpayer, JOE H. WEITZNER, could not by himself devise, convey or encumber the homestead nor allow it to pass by the ordinary rules of intestacy. (Statutory provisions supra.)

The hiatus created between the normal incidents of property ownership and those incidents of homestead ownership represents property rights belonging to the wife during her husband's lifetime. The Florida courts have held:

1. **Hill v. First Nat. Bank of Marianna et al., 84 So. 190, (Fla. 1920)**

"The homestead right is not limited to a mere holding of the legal title to the exempt property 'from forced sale; it contemplates and includes the beneficial, peaceful and uninterrupted use and enjoyment of such property. Such right is superior to the claims of creditors. The policy of the law conferring it is to preserve the home for the family even at the sacrifice of just demands and to protect the family from destitution and want.

'The whole theory of the law with relation to homesteads is based upon the idea that as a matter of public policy, for the promotion of the prosperity of the state, and to render independent and above want each citizen of the government, it is proper he should have a home where his family may be sheltered, and live beyond the reach of financial misfortune, and the demands of creditors, who have given credit under such a law.' 13 R.C.L. 543.

The rights of the wife and family in homestead real estate are such that it cannot be alienated without the joint consent of husband and wife when that relation exists, and an attempted conveyance in which there is not such a joinder when such relation exists is ineffectual to convey any title to such property. The benefits of the homestead exemption law may not be waived by a householder in such a way as to deprive his family of its protection. Neither does the death

of such householder strip property so impressed of its character as a homestead. It descends to his heirs exempt from liability for the indebtedness of the head of the family, and the right of the heirs to its exemption after it passes to them is not dependent upon a use by them of such property as a homestead."

2. **Jackson et al. v. Jackson et al., 107 So. 255, 256 (Fla. 1925).**

"The implied limitations contained in a Constitution are as much a part of the organic law and are as effective as those which are expressed. By providing, in article 10 of the Constitution (sections 1, 2, 4), that 'a homestead to the extent of,' etc., 'owned by the head of a family residing in this state *** shall be exempt from forced sale under process of any court,' with stated exceptions, and that 'no judgment or decree or execution shall be a lien upon exempted property except as provided,' etc., and in limiting the owner's power of alienation, the Constitution protects the family home from forced sale and from an alienation that is not in accord with the organic provisions, while the head of the family is living. By the provisions that 'the exemptions provided for *** shall inure to the widow and heirs of the party entitled to such exemption,' and that the article shall not 'prevent the holder of a homestead from alienating his or her homestead so exempted by deed or mortgage duly executed by himself or herself, and by husband and wife, if such relation exists,'

the Constitution expresses an intent to protect rights given to the children who, under the statute, are the 'heirs' at the death of their father, the head of the family and owner of the homestead, as well as to protect rights given to the wife who became the widow, on the death of the husband and father. And, with this as a purpose, the provisions expressly limiting the power of alienation are designed to protect the children who become 'heirs' as well as to protect the widow against any attempted transfer of the homestead real estate that it not contemplated by the Constitution, as well as by an attempted transfer or mortgage that is not jointly consented to and duly executed as is expressly required by the Constitution.

The alienation of the homestead real estate that is contemplated by the Constitution is not a voluntary conveyance of the legal title to one of the parties whose consent, given by a duly executed deed or mortgage, is made essential to the alienation. The organic provisions intended that, at the death of the owner of a homestead, the homestead exemptions shall inure to the widow and heirs in the way fixed by statute, and the intent of such provision is that neither the widow nor the heirs shall be deprived of their prospective rights by a transfer of the title to the homestead except by an alienation in which the wife shall join, and the provision for such joinder does not contemplate a direct or an indirect voluntary conveyance of the homestead real estate to the wife.

" . . . The children of the owner, who are his statutory 'heirs', have a right and interest in the homestead real estate exemptions that are secured by the Constitution, and the owner cannot transfer the property to another except by the alienation that is expressly provided for, in which the wife must join. And the joint deed or mortgage of husband and wife, required by the Constitution, necessarily contemplates an alienation to others than the wife, at least where the conveyance to her is **without consideration**, and there are children to whom, as heirs, together with the widow, the exemption by the express terms of the Constitution 'shall inure' at the death of the owner.

. . . While the Constitution controls homestead exemptions, it does not regulate the inheritance of the property except as such inheritance is affected by the organic provisions restricting alienation and providing that the 'exemptions shall inure to the widow and heirs of the party entitled to such exemption.' The statutes regulate the descent of all property, including that which may be subject to homestead exemptions under the Constitution. The exemptions are intended, not only for the benefit of the widow, but also for the benefit of the children who as to the homestead are the owner's 'heirs'."

3. **Hutchinson v. Stone, 84 So. 153, 154 (Fla. 1920).**

"The exempt property is for the benefit of the 'heirs' as well as of the 'widow' of the owner.

"If a 'deed or mortgage' alienating the homestead it not 'duly executed *** by husband and wife, if such relation exists', the deed or mortgage is ineffectual to convey or to encumber the homestead property. In the mortgage or conveyance of homestead real estate none of the requirements of the Constitution or the statute may be waived by the husband and wife or by either of them. It is the wife's acknowledgment before a proper officer, separate and apart from her husband, that she executed the instrument freely and voluntarily, without compulsion or fear of or from her husband, and not merely the wife's signature to the instrument, that makes it effective as to her. The 'heirs' of the homestead owner, as well as the owner and his wife, if he has one, have an interest that can be 'alienated' only as provided in the Constitution. If the requirements of the Constitution and statutes are not complied with in 'alienating' homestead real estate, the attempt is a nullity as to the 'heirs' of the homestead owner and also as to the husband and wife."

4. **Church v. Lee et al., 136 So. 246, 247 (Fla. 1931)**

"It must be conceded that neither the Constitution nor the statutes in terms prohibits, or declares invalid, a deed made by the owner of a homestead and his wife undertaking to convey the homestead directly to the wife nor to a third person, who immediately reconveys to the wife. Such a prohibition may be necessarily implied, however, as was indicated in the case of **Jackson**

v. Jackson, 90 Fla. 563, 107 So. 255, wherein it was held that:

> 'The implied limitations contained in a Constitution are as much a part of the organic law, and are as effective as those which are expressed.'

It seems, therefore, that if the owner of a homestead and his wife cannot legally convey the homestead to the wife through the medium of third parties, it necessarily follows that they cannot jointly convey it directly to the wife, where there are children, adult or minors, for if an act is not permitted to be done indirectly it follows that it may not be done directly.

. . . It seems very clear that the above statute does not, in view of article 10 of the Constitution and the statutes cited, and in the light of the above decisions of this court, apply to homestead real estate, as such transfer would in effect abrogate or cancel the inheritable rights of the children in the homestead vouchsafed by said article 10 of the Constitution and statutes of this state. It has been several times held that deeds to the homestead made by the husband alone to the wife are invalid, where there is a child or children surviving.

. . . We are of the opinion that a deed to a homestead, executed either by the owner alone or jointly by the owner and his wife directly to the wife as grantee, where there is a child or chil-

dren living, whether minors or adult, is prima facie ineffective to convey legal title to such homestead, in so far as the vested interest of the children are concerned. It would still remain the homestead if it was such at the time of making such deed and at the death of the head of the family.

. . . If the above conclusion is not correct, the constitutional prohibition would be of little effect, in many instances, to protect the homestead rights and interests of children.

. . . It seems very clear that article 10 was only intended to apply to bona fide alienations of the "homestead to third parties for a valuable consideration, and not to transfers made directly or indirectly to the wife which necessarily has the effect to divest children of the owner of their vested rights in the homestead."

5. In re: Noble's Estate, 73 So.2d 873 (Fla. 1954)

"The purpose of homestead provisions is simply to shelter the family that lives, or survives. The underlying principle being the same, there seems no need now to engage in a separate discussion of the law as it relates on the one hand to immunization from debt such as we find in Section 1 of Article X, F.S.A., and on the other hand to descent, some of which we have already cited."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 19,248

RAYMOND WEITZNER, Administrator of the Estate of Joe H. Weitzner, Deceased; LILLIE WEITZNER, RAYMOND WEITZNER and VIRGINIA RAIDER,

Appellants,

-vs-

UNITED STATES OF AMERICA,

Appellee.

MOTION TO CERTIFY QUESTION TO FLORIDA SUPREME COURT

The Appellants, RAYMOND WEITZNER, Administrator of the Estate of Joe H. Weitzner, Deceased, LILLIE WEITZNER, RAYMOND WEITZNER and VIRGINIA RAIDER, would show unto the Court as follows:

1. Florida Statute 25.031 and Florida Appellate Rule 4.61 provide that when the Circuit Court of Appeals is involved in any proceeding wherein questions or propositions of law of Florida are determinative of said cause and there are no clear, controlling precedents in the decisions of the Supreme Court of Florida, the Court of Appeals may certify such questions or propositions of law to the Supreme Court of the State of Florida for instructions concerning such questions or propositions of said law.

2. The question involved in this cause is one directly falling within the scope of the said Statute.

WHEREFORE, the Appellants pray that the Court of Appeals in exercise of their discretion will certify the question presented in the cause to the Supreme Court of Florida for instructions.

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CERTIFICATE OF SERVICE OMITTED

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19248

RAYMOND WEITZNER, Administrator of the Estate of Joe H. Weitzner, Deceased, LILLIE WEITZNER, RAYMOND WEITZNER, and VIRGINIA RAIDER,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(October 17, 1962)

Before RIVES, JONES, and GEWIN, Circuit Judges.

JONES, Circuit Judge. Before considering the merits of this appeal we dispose of the motion of the appellants to certify the case to the Supreme Court of Florida under Florida Statutes § 25.031 and Florida Appellate Rule No. 4.61. This motion was carried with the case. It is denied.

The facts are stipulated. By the stipulation it is shown that, on December 12, 1946, Joe H. Weitzner purchased a parcel of land in Dade County, Florida, upon which a dwelling had been erected. He and his wife promptly occupied the property and resided upon it until his death on October 9, 1956. At the time of the purchase and at all times thereafter Weitzner and his wife were the parents of two grown children, neither of whom ever resided upon the property. In January of 1954, federal income tax assessments were made against Joe H. Weitzner in the amount of $125,717.63 for tax deficiencies for 1942 and 1943. A tax lien notice was filed in the office of the Clerk of the Circuit Court of Dade County, Florida, on April 9, 1954. On August 17, 1956, Joe H. Weitzner, without joinder of his wife, executed a deed, without valuable consideration, purporting to convey the property to his wife. The United States brought suit to foreclose its tax lien. Joined as defendants were the widow of Joe H. Weitzner, his two children and the administrator of his estate. It was the contention of the defendants that, although exemptions do not generally preclude the United States from levying upon property for the satisfaction of tax liens, the Florida Constitution and statutes gave to the wife and children of Weitzner, at the time the property was acquired and occupied as homestead, a vested property interest and estate which is separate and apart from the title of the husband. This property interest, the widow and children contend, cannot be attached for obligations which they did not incur and for which they are not liable. The interest of the husband in the property they assert, was not such an interest as could be levied upon and sold separate from the interests of widow and chil-

dren. The district court held that Weitzner had full property rights in the homestead and the constitutional and statutory restrictions upon his power to convey and devise the homestead property did not prevent the tax lien from attaching nor prevent its foreclosure. The court's decree directed the foreclosure of the tax lien and the sale of the property. The widow, the children and the administrator have appealed.

Homestead in Florida is created and governed by the State Constitution[1] and Statutes.[2] There are, as clearly

[1]Section 1. *Homestead defined; nature of exemption.*
Section 1: A homestead to the extent of one hundred and sixty acres of land, or the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this State, together with one thousand dollars worth of personal property, and the improvements on the real estate, shall be exempt from forced sale under process of any court, and the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists. But no property shall be exempt from sale for taxes or assessments, or for the payment of obligations contracted for the purchase of said property, or for the erection or repair of improvements on the real estate exempted, or for house, field or other labor performed on the same. The exemption herein provided for in a city or town shall not extend to more improvements or buildings than the residence and business house of the owner; and no judgment or decree or execution shall be a lien upon exempted property except as provided in this Article.
Section 2. *Exemption to inure to widow and heirs.*
Section 2: The exemptions provided for in section one shall inure to the widow and heirs of the party entitled to such exemption, and shall apply to all debts, except as specified in said section.

* * *

Section 4. *Alienation of homestead.*
Section 4: Nothing in this article shall be construed to prevent the holder of a homestead from alienating his or her homestead so exempted, by deed or mortgage duly executed by himself or herself, and by husband and wife, if such relation exists; nor if the holder be without children to prevent him from disposing of his or her homestead by will in a manner prescribed by law. Fla. Const. Art. X.

[2]Any property, real or personal, held by any title, legal or equitable, with or without actual seisin, may be devised or bequeathed by will; provided, however, that whenever a person who is head of a family

appears, two aspects of homestead in Florida,[3] the exemption from judicial sale and the transfer of title by conveyance, devise or descent. As Mertens has said, "It is well settled that state exemption laws do not protect property against federal tax liens . . . Nevertheless, there is a conflict in the cases as to whether a tax lien is valid upon a homestead interest. The resolution of this issue may depend upon whether there is involved a single interest of the taxpayer who is subject to tax liability, or whether both spouses have an interest while only one is under a tax liability." 9 Mertens Law of Federal Income Taxation, Ch. 54, p. 102, § 54.52. If it is determined that a wife does not have, during the lifetime of her husband, a property right in a homestead where the title is in his name alone, we need proceed no further and the Government should prevail.

---

residing in this state and having a homestead therein, dies and leaves either a widow or lineal descendants or both surviving him, the homestead shall not be the subject of devise, but shall descend as otherwise provided in this law for the descent of homesteads. Fla. Stat. Ann. § 731.05.

The homestead shall descend as other property; provided, however, that if the decedent is survived by a widow and lineal descendants, the widow shall take a life estate in the homestead, with vested remainder to the lineal descendants in being at the time of the death of the decedent. Fla. Stat. Ann. § 731.27.

The homestead shall not be included in the property subject to dower but shall descend as otherwise provided by law for the descent of homesteads. • • • Whenever the decedent has died intestate leaving no lineal descendants and the widow has duly elected dower, all property of the decedent not included in the widow's dower shall descend to her subject to the debts of the decedent except that the homestead of the decedent shall descend to her with the exemptions provided by the constitution. Fla. Stat. Ann. § 731.34.

[3] We omit, as wholly inapplicable, any consideration of the homestead tax exemption in Florida. Fla. Const. Art. X, Section 7.

It has long been settled that the homestead provisions of the Florida Constitution do not create property rights in the husband, wife or children. They are exemption provisions and these provisions inure to the widow and heirs if, by the laws of descent the homesteader's title is cast upon them. *Hinson v. Booth*, 39 Fla. 333, 22 So. 687; *Johns v. Bowden*, 68 Fla. 32, 66 So. 155; 1 Redfearn, Wills and Administration of Estates in Florida 116, § 232; 16 Fla. Jur. 273, Homesteads § 3. The Constitution restricts and the statute prohibits the testamentary disposition of homestead. The provisions for the descent of homestead are no more than they purport to be — provisions for the transfer of the homestead property from the homesteader-owner to those designated by the statute as entitled to inherit from him, and fixing the nature of the estates which the law casts upon them at his death. Such provisions neither diminish the character of the estate of the homesteader nor create any ownership interest in the wife. The requirement for the consent of the wife to the alienation of the homestead does not create or recognize a property interest in her.

The wife, in order to acquire the property, or interest in it, must survive her husband, the husband and wife relationship must exist at the time of his death, and the property must have been occupied at the time of his death by a family of which the husband was the head. The homestead was designed for the purpose of protecting the head of the family by securing to him a shelter for himself and the members of his family. *Hill v. First National Bank*, 79 Fla. 391, 84 So. 190, 20 A.L.R. 270. The rights of a wife to the benefit of this protection during her husband's lifetime are marital rights rather than property rights.

As in the case of inchoate dower,[4] that which the wife has during her husband's lifetime with respect to homestead ownership is remote, uncertain and a mere expectancy or possibility and not a vested property right, interest or title. It follows that the tax liens of the United States were and are valid and enforceable against the property claimed as homestead. The judgment of the district court is

AFFIRMED.

[4]See 11 Fla. Jur. 55, Dower § 21, and cases there cited.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1961

No. 19,248

D. C. Docket No. 9727-M-Civil

RAYMOND WEITZNER, Administrator of the Estate of Joe H. Weitzner, Deceased, LILLIE WEITZNER, RAYMOND WEITZNER, and VIRGINIA RAIDER,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before Rives, Jones and Gewin, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

October 17, 1962

Issued:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19248

RAYMOND WEITZNER, Administrator of the Estate of Joe H. Weitzner, Deceased, LILLIE WEITZNER, RAYMOND WEITZNER, and VIRGINIA RAIDER,
Appeliants,

vs

UNITED STATES OF AMERICA,
Appellee

Appeal from the United States District Court for the Southern District of Florida

---

(November 19, 1962)

ON PETITION FOR REHEARING

Before RIVES, JONES and GEWIN, Circuit Judges

PER CURIAM

IT IS ORDERED That the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby DENIED.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 698

RAYMOND WEITZNER, ADMINISTRATOR OF THE ESTATE OF JOE H. WEITZNER, DECEASED, LILLIE WEITZNER, RAYMOND WEITZNER, AND VIRGINIA RAIDER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (R. 3–6)[1] are not officially reported. The opinion of the court of appeals (Pet. App. 3–8) is reported at 309 F. 2d 45.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1962, and a petition for rehearing was denied on November 19, 1962. (Pet. App. 9, 10.) The petition for a writ of certiorari was filed on December

[1] "R." references are to the Transcripts of Record in the court of appeals.

28, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below erred in holding that the Florida homestead provisions are exemption provisions, and do not create property rights in the wife and children so as to preclude the attachment of a federal tax lien upon the property owned by the taxpayer-husband.

CONSTITUTION AND STATUTES INVOLVED

Article X, Section 1, Section 2, Section 4 and Section 6 of the Constitution of the State of Florida and Section 731.05, Section 731.27 and Section 731.34 of 21 Florida Statutes Annotated (1960 Cum. Pocket Part) are set out in the Appendix, *infra*, pp. 7–9.

STATEMENT

On December 12, 1946, Joe H. Weitzner purchased the real property in suit and took title in his own name. From that time until his death he occupied the property under such circumstances as to bring it within the homestead exemptions afforded by the Florida Constitution. (R. 2, 4; Pet. App. 4.)

On January 29, 1954, tax assessments in the amount of $125,717.63 were made against Joe H. Weitzner for income taxes due for the years 1942 and 1943. The liability was not paid and on April 19, 1954, notices of liens were filed covering the property in question. Mr. Weitzner died on October 9, 1956, leaving his wife and two adult children. (R. 2, 4; Pet. App. 4.)

This suit was brought by the government to enforce its tax liens. The district court found that the tax lien was superior to any interests the wife and children might have in the property and ordered it sold subject to a mortgage conceded to be prior. (R. 7–10.) The court of appeals denied petitioners' motion to certify the case to the Florida Supreme Court under Florida Statutes, Section 25.031, and Florida Appellate Rule No. 4.61 (Pet. App. 1–3), and affirmed the judgment of the district court (Pet. App. 4–8).

ARGUMENT

The judgment below is correct and no conflict in decisions is presented. The case is not one calling for application of the principle of abstention, and there is no occasion for further review by this Court.

1. The decision below is correct. There is no question here that federal tax liens attached to the property owned by the taxpayer unless the Florida homestead provisions did more than exempt the property from his creditors and created during his lifetime property rights in his wife and children.

The Florida homestead laws are found in Article X of the Florida Constitution, Appendix, *infra*, pp. 7–8, and Chapter 731 of the Florida Probate Laws, Title XLI, Florida Statutes Annotated, Appendix, *infra*, pp. 8–9. In summary, the Florida Constitution creates an exemption from forced sale on certain real property and this exemption inures to the widow and heirs upon the owner's death. The "inuring" is insured by requiring the spouse's consent for aliena-

tion of the property and by the probate laws which provide special rules of descent.

The petitioners contend that as a matter of Florida law these provisions create vested property rights in the wife and children during the taxpayer's lifetime. Upon a detailed examination of the nature of the homestead interests created by Florida law, however, the court of appeals, affirming the district court, concluded that the homestead provisions created no property rights in the wife and children but only an exemption of the property from creditors. See Pet. App. 7–8. That decision, concurred in by four judges familiar with Florida law, is a reasonable one, fully supported by the Florida decisions, and "under familiar principles will be accepted here." *Sims* v. *United States,* 359 U.S. 108, 114.

2. There is no conflict. On the contrary, the decisions of the other courts look in the same direction; they treat homestead laws as state-created exemptions from creditors which cannot defeat the federal tax lien. *United States* v. *Heffron,* 158 F. 2d 657 (C.A. 9th), certiorari denied, 331 U.S. 831; *United States* v. *Heasley,* 283 F. 2d 422 (C.A. 8th); see also *Shambaugh* v. *Scofield,* 132 F. 2d 345 (C.A. 5th). The decision of the Tenth Circuit in *Jones* v. *Kemp,* 144 F. 2d 478, resting upon the features of the Oklahoma law which that court regarded as having created property rights, is dicta, since the decision in the case was in favor of the government on the ground that there was no marital relationship.

3. Petitioners claim (Pet. 6, 8) that the question presented should have been certified by the court of

appeals to the Florida Supreme Court. They cite *United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 U.S. 134, and *Clay* v. *Sun Insurance Office, Ltd.*, 363 U.S. 207, in which this Court held that decisions based on constitutional grounds were premature in the absence of interpretation of local law by the state courts. However, no constitutional issue is lurking in this case, and, in any event, abstention by a federal court is employed not at the mere showing of a question to be determined by state law, but only when the interpretation of a state statute by federal courts presents a hazard of disrupting federal-state relations. *Meredith* v. *Winter Haven*, 320 U.S. 228, 237; *Allegheny County* v. *Mashuda Co.*, 360 U.S. 185, 188–189; *Martin* v. *Creasy*, 360 U.S. 219, 224.

This case meets none of the tests normally relied upon for application of the abstention principle. The judgment below does not create a hazard to federal-state relations; there is no impairment of state functions; and there is no declaration with respect to the constitutionality of the Florida homestead laws. The case involves the enforcement of a federal tax lien against property and rights to property of a taxpayer as authorized by Section 6321 of the Internal Revenue Code of 1954 (26 U.S.C. 6321). In enforcing that provision, as well as other provisions of the revenue laws, federal courts frequently must determine the effect to be given state law with respect to specific property and rights to property.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
JOSEPH KOVNER,
RICHARD J. HEIMAN,
Attorneys.

JANUARY 1963.

APPENDIX

Constitution of the State of Florida:

ARTICLE X

HOMESTEAD AND EXEMPTIONS

Section 1. A homestead, to the extent of one hundred and sixty acres of land, or the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this State, together with one thousand dollars worth of personal property, and the improvements on the real estate, shall be exempt from forced sale under process of any court, and the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists. But no property shall be exempt from sale for taxes or assessments, or for the payment of obligations contracted for the purchase of said property, or for the erection or repair of improvements on the real estate exempted, or for house, field or other labor performed on the same. The exemption herein provided for in a city or town shall not extend to more improvements or buildings than the residence and business house of the owner; and no judgment or decree or execution shall be a lien upon exempted property except as provided in this Article.

Section 2. The exemptions provided for in section one shall inure to the widow and heirs of the party entitled to such exemption, and

shall apply to all debts, except as specified in said section.

* * * * *

Section 4. Nothing in this Article shall be construed to prevent the holder of a homestead from alienating his or her homestead so exempted by deed or mortgage duly executed by himself or herself, and by husband and wife, if such relation exists; nor if the holder be without children to prevent him or her from disposing of his or her homestead by will in a manner prescribed by law.

* * * * *

Section 6. The Legislature shall enact such laws as may be necessary to enforce the provisions of this Article.

21 Florida Statutes Annotated (1962 Cum. Pocket Part):

SEC. 731.05. *Property which may be devised*

(1) Any property, real or personal, held by any title, legal or equitable, with or without actual seisin, may be devised or bequeathed by will; provided, however, that whenever a person who is head of a family, residing in this state and having a homestead therein, dies and leaves either a widow or lineal descendants or both surviving him, the homestead shall not be the subject of devise, but shall descend as otherwise provided in this law for the descent of homesteads.

* * * * *

SEC. 731.27. *Descent of homesteads*

The homestead shall descend as other property; provided, however, that if the decedent is survived by a widow and lineal descendants, the widow shall take a life estate in the homestead, with vested remainder to the lineal

descendants in being at the time of the death of the decedent.

* * * * *

SEC. 731.34. *Dower in realty and personalty*

* * * The homestead shall not be included in the property subject to dower but shall descend as otherwise provided by law for the descent of homesteads. * * * Whenever the decedent has died intestate leaving no lineal descendants and the widow has duly elected dower, all property of the decedent not included in the widow's dower shall descend to her subject to the debts of the decedent except that the homestead of the decedent shall descend to her with the exemptions provided by the constitution.

U. S. GOVERNMENT PRINTING OFFICE: 1923

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 698

RAYMOND WEITZNER, Administrator
of the Estate of Joe H. Weitzner, Deceased,
LILLIE WEITZNER, RAYMOND WEITZNER,
and VIRGINIA RAIDER,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF OF PETITIONERS

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Supreme Court of the United States

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF OF PETITIONERS

The Florida Supreme Court in **Reed v. Fain, 148 So.2d 858 (Fla. 1962)**, which appeared in the Advance Sheets after the preparation of the Petition for Certiorari, clearly answers the questions presented in this Appeal.

The Florida court distinguished the interests of the children from those of the wife of the homestead owner. It held that the interests of the children are inchoate and therefore the ruling now under review is correct so far as the rights of the children are concerned. The court refused to apply the inchoate label to the wife's interest, however, and stated on Page 870:

> **" . . . J. M. and Stella Reed had the right of possession of the homestead property until the death of J. M. Reed, and Stella Reed, as widow, had such right threafter by virtue of the life estate which vested in her by operation of law."** (Emphasis supplied)

and further stated on Page 865:

> "The artifice employed by the Reeds and their son was also ineffectual as to the 'inchoate' interest of George **as well as the interest of Stella Reed as the 'widow' of the homestead owner."** (Emphasis supplied)

This case is set out in full in the Appendix.

This court has receded from the theory of the Respondent that the abstention doctrine is applied "only when the interpretation of a State statute by Federal courts presents a hazard of disrupting Federal-State relations." In **Clay v. Sun Insurance Office, Ltd., 363 U.S. 207,** this court remanded to the Florida Supreme Court not only the question of interpretation of the State statute dealing with the invalidation of contract clauses shortening the applicable Statute of Limitations in Flor-

ida but also the question of whether the loss sued upon was within the "all risks" coverage of the insurance policy.

Respectfully submitted,

WILLIAM GRESHAM WARD
Attorney for Petitioners
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Miami, Florida

APPENDIX

Reed v. Fain, 145 So.2d 858 (Fla. 1962)

THORNAL, Justice.

By petition for writ of certiorari we are requested to review a decision of the District Court of Appeal, Second District, appearing at 122 So.2d 322, because of an alleged conflict on the same point of law with prior decisions of this Court.

Our judgment turns on the interpretation and application of Section 95.23, Florida Statutes, F.S.A., which applies to certain instruments which have been on record for twenty years or more.

We rely upon the opinion of the district court for our factual summary. For continuity, we repeat a few of the significant facts. In 1930, J. M. Reed, joined by his wife, Stella, conveyed his homestead to his son the petitioner, George V. Reed. George immediately reconveyed the property to J. M. and his wife in order to create an estate by the entirety. Title originally was held by J. M. alone. Both conveyances were without consideration. In 1951, the father and mother conveyed the property to their son George, reserving to themselves a life estate with survivorship. The 1951 conveyance had no effect upon the outcome of this litigation because at the time of its execution, J. M. Reed lacked the mental capacity to execute the document. The factual statement of the district court then contains the observation "Stella M. Reed conveyed her **life estate** to George in 1955." (Emphasis added.) She died within a year. In 1957, respondent Vivian Reed Fain, daughter of J. M. and Stella Reed, filed this suit in equity to obtain cancellation of the deeds

above mentioned. She alleged fraud and undue influence, lack of consideration and the violation of her rights under the Florida Homestead Laws. The defendants in the trial court, who are the petitioners here, filed an answer in which they relied upon Section 95.23, Florida Statutes, F.S.A., in view of the fact that the 1930 conveyance to J. M. and Stella Reed had been of record without adverse claim for more than twenty years. To give the subject statute the effect contended for by the plaintiffs below, the chancellor concluded that when J. M. Reed died in 1954, he held title to the property as a homestead, that it inured to his widow as a life estate and then to his two children in fee as tenants in common. He held that the 1957 deed from Stella to her son George, conveyed only her life estate because in his view she had nothing else to convey. The chancellor reached this conclusion by holding the 1930 transaction between the Reeds and their son George, as being an ineffective attempt to alienate the homestead without consideration.

The decision of the chancellor was affirmed by the district court, 122 So.2d 322, although the judges of that court were not in accord as to their reasons therefor. We are now requested to review the decision of the district court because of an alleged direct conflict with prior decisions of this Court in Barnott v. Proctor, 128 Fla. 63, 174 So. 404, and Thompson v. Thompson, Fla., 1954, 70 So.2d 555.

At the outset, we deem it advisable to invite attention to an aspect of the decision under review which might escape a mere casual reading. The apparent majority decision is actually not the decision of the court on the critical aspect of the case which is the interpretation

to be given Section 95.23, supra. It will be noted that on this aspect of the problem the controlling decision is really designated as a specially concurring opinion. In our discussion of the matter we treat the so-called specially concurring opinion as the decision of the district court to be measured by the rules of the alleged prior conflicting opinions of this Court.

Section 95.23, Florida Statutes, F.S.A., provides as follows:

> "Limitations where deed or will of record for twenty years or more. — After the lapse of twenty years from the record of any deed or the probate of any will purporting to convey lands no person shall assert any claim to said lands as against the claimants under such deed or will, or their successors in title.

> "After the lapse of twenty years all such deeds or wills shall be deemed valid and effectual for conveying the lands therein described, as against all persons who have not asserted by competent record title an adverse claim."

The majority of the court of appeal had the view that the twenty-year period prescribed by this statute begins to run from the date of record of a deed or probate of a will. Unless something is read into the statute which is not apparent from the clear language thereof, this conclusion is the correct one. It is supported by the prior decisions of this Court in Moyer v. Clark, Fla., 1954, 72 So.2d 905; Thompson v. Thompson, supra, and Barnott v. Proctor, supra.

The judge writing the minority view of the district court on this subject makes reference to an article by Dr. James W. Day, entitled "Curative Acts and Limitations Acts Designed to Remedy Defects in Florida Land Titles—IV.", IX U. of Fla. L.Rev. 145. As expressed in the cited article it is the view of Dr. Day and Judge Shannon of the district court that Section 95.23, supra, is in the nature of "a curative act with a limitation provision." In this view, the twenty-year provision of Section 95.23, supra, does not begin to run until a cause of action accrues in favor of the party asserting the adverse claim against the recorded instrument. This view stems from the contention that if applied otherwise, the act would be unconstitutional for the reason that the twenty year period could run before the accrual of a right of action adverse to the recorded instrument. Those of us who sat at the knee of Professor Day in the University of Florida College of Law, regard his views on any subject, and particularly real property, with tremendous respect. We would not lightly lay aside the opinions and advice of one who has contributed so much to the development of the law and lawyers in Florida. We think it unnecessary, however, in this case to take issue with the analysis of the statute expressed in the opinion by Judge Shannon, except to conclude that in the instant case it was not applicable.

The property here involved was a homestead. The Florida Constitution, Article X, Section 4, F.S.A. and the Florida Statutes, Section 731.27, F.S.A., obviously recognize the homestead and the interests of the family in the title thereto as a very special kind of property right that enjoys the fullest measure of protection against improper encroachment and illegal alienation. The point that re-

curs is that Mrs. Fain could have proceeded to protect her interests during the running of the twenty year period from the date in 1930 when the deed was recorded. We think she could have done so by an appropriate proceeding in equity to establish the property as a homestead at the time of the 1930 transaction, as well as to adjudicate the effectiveness of the alienation that was attempted at that time. We have said that a deed to homstead between husband and wife, where there is a child or children living "is prima facie ineffective to convey legal title to such homestead, insofar as the vested interest of the children are concerned." Church v. Lee, 102 Fla. 478, 136 So. 242, 147. This Court had earlier committed itself to the proposition that "the 'heirs' of the homestead owner, as well as the owner and his wife, if he has one, have an interest that can be 'alienated' only as provided in the Constitution. If the requirements of the Constitution and the statutes are not complied with in 'alienating' homestead real estate the attempt is a nullity as to the 'heirs' of the homestead owner and also as to the husband and wife." Hutchison v. Stone, 79 Fla. 157, 84 So. 151, 154.

In view of the decisions of this Court which have consistently been extended to protect the interest of the heirs of a homestead owner, we have the view that in the event that there is an attempted alienation which is illegal or otherwise ineffective against the heirs, then they may immediately enter a court of equity to establish their interest in the subject matter. By following this application of the rule, Section 95.23, supra, is saved against the constitutional impediment suggested by Professor Day and Judge Shannon, and permits the applica-

tion of the statute just as it was written by the Legislature.

What we have heretofore written deals with the interpretation of Section 95.23, supra. It remains for us to determine whether the decision of the Court of Appeal conflicts with prior decisions of this Court in Thompson v. Thompson, supra and Barnott v. Proctor, supra. We regret that we are not able to agree with the district court as to its asserted distinguishing characteristics which would differentiate the instant case from prior decisions of this Court. We are, therefore, compelled to conclude that there is a conflict of decision on the same point of law fatal to the decision of the district court here.

In Thompson v. Thompson, supra, a father conveyed the homestead to the mother thinking that in so doing he could avoid certain debts. This was in 1926. Twenty five years later the mother died, leaving a will by which she devised the land to one son of the couple. In 1953 the father and remaining children proceeded in equity to set aside the 1926 deed on the ground that it was an inffective attempt to alienate the homestead. This Court, in no uncertain terms, applied Section 95.23, supra, to the rights of the father and the children and held that the deed to the deceased mother which had been of record for more than 20 years, was immune to attack. We think there is direct parallel between the rule of law which this Court announced in Thompson v. Thompson and the rule which should be applied in the instant case. There is, likewise, a substantial parallel between the rule of Barnott v. Proctor, supra, and the rule applicable here. However, it is not as pointed because of the intervention

of what appeared to be the interest of a bona fide third party claimant in Barnott.

We invite attention to the holding of the chancellor as reflected by the opinion of the district court. He, apparently, took the view that when Stella Reed conveyed all of her interest in the property to the petitioner George Reed in 1955, she conveyed merely a life estate for the simple reason that in view of the chancellor she owned only a life estate. Inasmuch as this matter will have to be returned to the district court for the entry of a correct judgment, this fact should be taken into consideration in the further disposition of the rights of the petitioner George Reed.

Because of conflicts hereinabove pointed out, the decision of the district court is quashed and the cause is remanded to that court for the entry of a judgment consistent herewith.

It is so ordered.

TERRELL, THOMAS and O'CONNELL, JJ., concur.

ROBERTS, C. J., and HOBSON and DREW, JJ., dissent.

DREW, Justice (dissenting).

Section 95.23, Florida Statutes 1957, F.S.A., around which this case revolves was enacted in 1925. So far as I have been able to discover, this Court has had occasion to consider this statute in seven reported cases while the District Courts of Appeal have considered it in two

cases. I must say it is difficult to reconcile the holdings of the Court in all of these cases, and I fear that the opinion of the majority does little to clear up the situation.

As pointed out in the majority opinion, Professor Day has expressed the view in his article that the subject act is a "curative act with a limitation provision". Professor Day's article discusses in great detail the various decisions which this Court has written. It must be remembered that the article was prepared and published in 1956 prior to the time that the District Court of Appeal of the First District rendered its opinion in Foremost Properties, Inc. v. Gladman, Fla.App.1958, 100 So.2d 669 and Garrett v. Oak Hall Club, Fla.App.1959, 112 So.2d 603. These two opinions of the District Court, in my judgment, support the theory of Professor Day. Moreover, most of our cases refer to this act as a statute of limitations. This being so, I revert to the main contention of Professor Day that the existence of a cause of action is a prerequisite to the operation of a limitations act. As I construe the opinion of the majority, they apparently concede this to be correct when they state in summary that Mrs. Fain, the objecting daughter, could have instituted these proceedings to question the validity of the subject conveyance at any time during the twenty-year period. I think the majority are wrong in their conclusion in this respect because the head of the family was living during this period of time. This fact would preclude the daughter, in my opinion, from maintaining an action because, as pointed out by Professor Day, under the statutes of this state the lineal descendants who inherit an interest in a homestead are those in being at

the death of the owner. To put it another way, during the lifetime of the father (during which the twenty-year statute was running) the daughter had no interest which would entitle her to maintain any cause of action in the courts of this State. I assume it could be argued that the effect of the majority opinion is to hold that such a cause of action did in fact exist in the daughter. I don't believe this point is properly before us in these proceedings. Even if it were, I could not agree that the children of the head of a family, during the lifetime of the head of the family, could maintain an action in any court to contest the validity of a deed of the homestead premises. This is particularly true where, as here, the head of the family continued in possession.

There can be no doubt that the deed involved in this litigation was void. In the Blocker case[2] this Court held that this statute did not embrace a forged deed and, in the opinion, this Court drew no distinction between a forged deed and a void deed. The authorities cited by the Court in the case did not distinguish between void deeds and forged deeds. They seemed to deal with them in the same breath and applied the same rules.

In the opinion this writer prepared for the Court in the Moyer case,[3] the statement is admittedly made that the statute validates and renders unimpeachable a deed or will of record for twenty years except as to those who have asserted by competent record an adverse claim. This statement is obviously obiter because in that case this Court specifically held that the statute was not involved.

[1]Section 731.27, Florida Statutes 1957, F.S.A.
[2]Wright v. Blocker, Fla. 1940, 144 Fla. 428, 198 So. 88.
[3]Moyer v. Clark, Fla. 1954, 72 So. 2d 905.

What we held there was that the fact that the deed to Nutting had been recorded for twenty years did not, under the statute, invalidate his conveyance to the defendant and that the defendant's title was superior to the plaintiff's as the plaintiff took his deed with the knowledge of the deed from Nutting to the defendant.

This indeed is an involved and highly important question. Some of the cases confuse rather than clarify the issues. In brief summary, I am of the view that the conclusions reached by Professor Day are correct and that this statute cannot operate against one until such party has a cause of action to attack the questioned deed.

I, therefore, respectfully dissent.

ROBERTS, C. J., and HOBSON, J., concur.

ON REHEARING

HOBSON, Justice.

After a lengthy and careful consideration of the controlling question in this case and the decisions which deal with it, we are convinced that no truer words were ever spoken than those appearing in Mr. Justice Drew's dissent. He states: "This indeed is an involved and highly important question. Some of the cases **confuse rather than clarify the issues.**" (Emphasis supplied.)

[1] We do not mean to be unduly critical of the initial majority opinion prepared by Mr. Justice THORNAL. He pursued the accepted course in following our

decision in the case of Thompson v. Thompson, Fla. 1954, 70 So.2d 555, after correctly deciding that the question of the District Court in the instant equitable action is directly in conflict on the same point of law with our decision in Thompson. However, the fact that this Court has jurisdiction to entertain and decide a case upon the theory of "conflict" does not mean that we cannot recede from our prior decision upon which such "conflict" is predicated if we, after a careful and thorough consideration of that decision, decide that it is unsound, ill-advised, unjust, illogical or inequitable. More anon upon the decision in the Thompson case.

[2] The real question in this case is not: "When did the twenty-year period set forth in Section 95.23 F.S. begin to run?" but rather: "Were the provisions of Section 95.23 F.S. intended to be applicable to a 'void' deed, or are they, in any event, applicable in this equitable suit under the facts disclosed by the record herein?" We answer both segments of this bipartite query in the negative.

As has been stated by Mr. Justice Drew in his dissent to the original majority opinion, " * * * the deed involved in this litigation was void. In the Blocker case this Court held that this statute did not embrace a forged deed and, in the opinion, this Court drew no distinction between a forged deed and a void deed." We agree.

However, in the Blocker case[1] there appears to be an even more significant fact which is that this Court **held a forged** deed to be a **void** deed and upon this premise decided that Sections 4660 and 4661, C.G.L. (F.S. Section

[1] Wright v. Blocker, 144 Fla. 428, 198 So. 88.

95.23, F.S.A.) were inapplicable thereto. Our decision in Blocker makes crystal clear the fact that F.S. Section 95.23, F.S.A., does not apply to a void deed. Furthermore, in the opinion in that case we said we do not think it was the intention of the Legislature that Sections 4660 and 4661, C.G.L. (F.S. Section 95.23, F.S.A.) should be applicable to a forged (void) deed.

Eleven sessions of the Legislature have come and gone since such statement was made by this Court and the subject statute has not been amended to include forged or void deeds. Consequently, it is now reasonable to assume that this Court was correct in its expressed thought with reference to the legislative intent.

[3] Homestead property is a special kind or species of property. It is so treated in our Constitution and in our statutes. The Legislature originally would have normally and specifically included homestead property had it intended such type of property to be embraced by Section F.S. 95.23, F.S.A. We held in Church v. Lee[2] that Section 5670 C.G.L. (F.S. Section 689.11, F.S.A.) is not applicable to "homestead real estate". Moreover, the legislators, many of whom are lawyers, are presumed, as is everyone, to know the law. Consequently, had it been their intention to place homestead property within the purview of F.S. Section 95.23, F.S.A., they would have expressly done so, because it is well established that equity is not necessarily bound by a statute of limitations. The legislators might have intentionally omitted "homestead property" from F.S. Section 95.23, F.S.A., because they may have envisaged the probability of the statute being declared unconstitutional.

[4] The voluntary deed from George V. Reed executed and delivered to his parents in the year 1930 was an ineffectual and futile attempt to create an estate by the entirety because the **voluntary** deed made to him by his parents was and is void—not merely voidable. It is not valid even as between the parties. In Hutchinson v. Stone, 79 Fla. 157, 84 So. 151, 154, we held that "The 'heirs' of the homestead owner, **as well as the owner and his wife,** if he has one, have an interest [in the homestead property] that can be 'alienated' **only** as provided in the Constitution. **If the requirements of the Constitution and statutes** are not complied with in 'alienating' homestead real estate, **the attempt is a nullity** as to the 'heirs' of the homestead owner and **also as to the husband and wife.**" (Emphasis supplied.) See also Church v. Lee.[2]

Prior to the Church case and subsequent to Hutchinson, we said, in Rawlins v. Dade Lumber Co., 80 Fla. 398, 86 So. 334:

> "Homestead rights inure to the widow and heirs of the owner of the homestead, who must be the head of a family residing in this state. It is for this reason that, when there are children or a child of the husband, a conveyance of homestead real estate to the wife by the husband alone is **void** under the Constitution, prescribing the method by which homestead real estate may be alienated." (Emphasis supplied.)

The entire transaction between the parents and their son was a nullity because it was violative of the constitutional inhibitions regarding the alienation of home-

[2]Church v. Lee, 102 Fla. 478, 136 So. 242, 247.

stead property. Were this not so, it nevertheless without doubt is true insofar as the "inchoate"[3] interest in the homestead property of the "heir" (Mrs. Fain) is concerned. Such interest is guaranteed to her and protected by Sections 1, 2 and 4, Article X of the Florida Constitution, F.S.A. as such sections have been construed by the Supreme Court of this State. The artifice employed by the Reeds and their son was also ineffectual as to the "inchoate" interest of George as well as the interest of Stella Reed as the "widow" of the homestead owner. It matters not that neither George Reed nor his mother has ever complained of the conspiratorial, fraudulent and invalid (void) transaction in which each was particeps criminis.

[5] It has always been my understanding that "once a homestead always a homestead" so long as the head of the family, with a child or children in esse, retain such status and continues to occupy the premises in conjunction with his wife or one or more members of his household. The only exception to the rule, of which we are cognizant, is that such property may, in a bona fide transaction based upon an "appropriate consideration",[4] be alienated as provided in and by our Constitution as the organic directives therein contained have been construed by this Court.

The undertaking engaged in by the Reeds and their son George was nothing more nor less than an abortive effort to change the character of the subject property from "homestead" to "an estate by the entirety".

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[3] The use of this descriptive adjective is hereinafter explained.
[4] Jackson v. Jackson, 90 Fla. 563, 107 So. 255.

This cabal did not divest the homestead property of its distinguishing attribute. It was, at most, only an "ineffectual" endeavor to do so. Consequently, under the facts of this case, the subject property retained its homestead quality until the death of J. M. Reed. The " * * * attempted 'alienation' merely left the title to the homestead substantially where it was before * * * ".[2]

In Jackson v. Jackson[4] we held:

> "In Florida, homestead real estate owned by a husband, who has a child or children living, cannot be conveyed by the husband to his wife, by the means of a deed of conveyance, without consideration, executed by the husband and wife to a third person, who, acting merely as a conduit or intermediary, without consideration, conveys or quitclaims the same homestead property to the wife. Norton v. Baya, 102 So. 361, 88 Fla. 1.
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> "The implied limitations contained in a Constitution are as much a part of the organic law and are as effective as those which are expressed."

The words "appropriate [or valuable] consideration" are not spelled out in Sections 1, 2 and 4, Article X of the Florida Constitution but according to our opinion in the Jackson case they constitute an "implied" limitation upon the alienation of homestead property. We have not receded from this pronouncement. This "implied" limita-

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[2]See note 2 on page 865.
[4]See note 4 on page 865.

tion when judicially declared became and remains "a part of the organic law". See State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739, 37 A.L.R. 1298; Getzen v. Sumter County, 89 Fla. 45, 103 So. 104; State ex rel. McKay v. Keller, 140 Fla. 346, 191 So. 542.

[6] It has been held, and we think with propriety, that "The judicial interpretation of constitutional provisions is so **forcible** that, where a new Constitution is adopted **without change of the rule laid down by the courts**, the construction is adopted by the new Constitution and becomes a part of it to the degree that it cannot be changed even by a statute expressly undertaking to do so." Lyle v. State, 80 Tex.Cr.R. 606, 193 S.W. 680. (Emphasis supplied.)

Although the reconveyance in Jackson was to the wife it nevertheless was, as in the instant case, an attempt to change the nature of homestead property in such manner as to destroy the constitutionally protected interests of an "heir" or "heirs". The principle of law declared in Jackson is equally applicable to the facts in this case.

F.S. Section 95.23, F.S.A., cannot make valid that which is void. According to this Court's opinion in Barnott v. Proctor, 128 Fla. 63, 174 So. 404, 406, "the statute does not purport" to do so.

In the Barnott case the statute was construed to act as a bar to the assertion of the invalidity of the critical deeds executed in 1892 because of the plaintiffs' acquiescent conduct and failure to assert their claim before the rights of an innocent third party intervened.

We are confident the conclusion reached in that case would have been the same had such a statute as F.S. § 95.23, F.S.A., never existed. The statute was used as a guide and invoked upon equitable principles, particularly the maxim to the effect that one who fails to speak when equity and good conscience require him to do so will not be heard when equity and good conscience demand that he remain silent.

Mr. Justice Brown in a logical dissent in Barnott expressed the opinion that the so-called innocent third party could not properly be so classified because he was "put on record notice as to the homestead character of the property" which was to be conveyed to him by mortgage deed. This reasoning was later adopted by the Supreme Court in a strong opinion by Mr. Justice Thomas.[5] In that case the Court held without equivocation that the holder of an otherwise bona fide mortgage on homestead property could **not** be an innocent third party whose rights should be protected by virtue of the fact that the mortgage was an "invalid instrument". The facts in the Dunphe case established that: The fee simple title was at all times vested in Mrs. Dunphe; she had become a "free dealer" by court action before she **alone** executed the mortgage deed upon the homestead property; she was the head of the family which fact was, without doubt, unknown to the mortgagee at the time of the execution of the mortgage and was not disclosed until he brought the foreclosure proceeding. Even so, we decided that the mortgagee did not occupy the position of an innocent third party, although he had actually loaned money to Mrs. Dunphe, for he was on record notice that the wife was a free

[5]Bigelow v. Dunphe, 143 Fla. 603, 197 So. 328. See also 144 Fla. 330, 198 So. 13.

dealer and owned the property; and he could have ascertained the homestead character of the property as well as the fact that Mrs. Dunphe was the head of the family had he, as was his duty, investigated the rights of those persons (husband, wife and her children) in possession of the property upon which the mortgage was intended to be and constitute a lien.

The mortgage was held to be an "invalid instrument" because it was not executed as required, in and by Article X of our Constitution, for the alienation of homestead property. For the reason that the mortgage was invalid and void, if you please, this Court permitted Mrs. Dunphe to defeat the mortgage foreclosure regardless of the fact that such decision in effect allowed her to take advantage of her own wrong.

The Dunphe case demonstrates how difficult it is to be an innocent third party when dealing with **homestead property.** The only instances which we can envisage at the moment, wherein one can attain the status of an innocent third party in transactions involving homestead property owned by the head of a family with a child or children then living, would be: First—acceptance of a deed or mortgage predicated upon a valuable consideration and executed by both husband and wife; second, by acquisition of a valid tax deed.[6] We have uniformly held that a tax deed creates a new and independent title which is paramount to and "entirely disconnected with" the former title. Hecht v. Wilson, 107 Fla. 421, 145 So. 250, denying rehearing and modifying 107 Fla. 421, 144 So.

[6]Every dictionary and reference book to which we have access gives "void", "null", "of no legal force", "null and void" as synonyms for "invalid" when such word is used in its legal sense.

886; Daniell v. Sherrill, Fla., 1950, 48 So.2d 736, 23 A.L.R. 2d 1410.

Although F.S. Section 95.23, F.S.A., was not involved in Dunphe, the decision does support the postulate "once a homestead, always a homestead" subject only to the limitations previously set forth herein.

[7-9] The statute under consideration, if applicable in any equitable action, is simply and solely a legislative enactment fixing a period of time which, after its expiration, operates as a bar or estoppel against anyone who would assert an adverse claim to a deed or will, because he failed to speak when equity and good conscience required him to act. It fixes a period of time beyond which laches as a matter of statutory law operates as a bar. In other words, the statute makes the simple lapse of time the criterion upon which laches is predicated. "But it is not mere delay that constitutes laches." Marshall v. C. S. Young Construction Co., 94 Fla. 11, 113 So. 565, 568, 55 A.L.R. 662. The doctrine of laches is never invoked or applied as a bar by virtue of nothing more than delay. Anderson v. Northrop et al., 30 Fla. 612, 12 So. 318; State ex rel. Shein v. Attwood, Fla., 1953, 64 So.2d 917, 919. An ad interim third party must act to his detriment in reliance upon such neglect or the delay must operate "to the disadvantage of the other party" or some other impelling equitable factor must intervene. Seaboard All Florida Ry. Co. et al. v. Underhill et al., 105 Fla. 409, 141 So. 306, 307. Laches, even when measured by a statutory yardstick, does not necessarily bar the assertion of rights in a court of equity which have been the subject of attempted invasion or destruction by action which is null and void, at least not until and unless the rights of inno-

cent third parties intervene or one (or more) of the transgressors has clearly demonstrated that the delay has prejudiced his alleged rights.

[10] It is very important to remember that **no interests of innocent third parties are involved in this case.** Consequently, Mrs. Fain had the right to institute, and has the privilege of maintaining, this action in a court of equity to secure the relief to which she is entitled as against the one living person who was a party to the not only fraudulent but void transaction designed to destroy her interest as an "heir" in and to the homestead property belonging to their common and immediate progenitor. The so-called equitable maxim that "equity follows the law" is invoked only in cases wherein the equities are equal.[7] This is not such a case.

We have hereinbefore employed the adjective "inchoate" in connection with Mrs. Fain's interest in the subject property. We did so because we believe it more nearly described the type of "interest" in homestead property which is granted to an "heir" by the Florida Constitution than any adjective we have seen used in our opinions dealing with such subject. Bouvier's Law Dictionary, Vol. I, Third Revision, page 1527, defines "inchoate" to mean "That which is not yet completed or finished."

In Long v. Long, 99 Ohio 330, 124 N.E. 161, 162, 5 A.L.R. 1343, it is stated:

> "Inchoate right is * * * 'that which is not yet completed or finished' * * *. It is, in short, merely

[7]For the author's view on this subject see his concurring opinion in Barbash v. Barbash, Fla. 1952, 58 So. 2d 168, 171.

> the beginning of a right that does not ripen unless the one possessing such right in the property of another shall survive."

[11, 12] Commissioner Andrews, in the case of **Church v. Lee**, inadvertently employed the descriptive adjective "vested" in referring to the inchoate interest of an "heir" in homestead property. Clearly such an interest is not "vested", legally speaking, until the death of the head of the family. Prior to that inevitable event and during the lifetime of an "heir" such "interest", although actual as distinguished from imaginary, is not a "vested interest". It is incipient, dependent and contingent, yet **genuine**. It is **created** and **protected** by our Constitution. It does not need to be **established** by a court decree except for the possible purpose of notice to one who might otherwise, in some manner, acquire as an innocent third party a partial, or the whole, interest in the fee simple title to homestead property.

Perhaps it is trite at this juncture for us to state, but we are impelled to do so, that we have misgivings concerning the statement in the original majority opinion to the effect that Mrs. Fain could have "immediately" [the record does not show whether she was sui juris in 1930] "entered a court of equity to **establish** [her] interest in the subject matter". (Emphasis supplied.) However, if such observation were unquestionable we could not agree that, under the facts of this case, she was barred from such action after the passage of the statutorily prescribed period of twenty years. Moreover, although the construction of F.S. Section 95.23, F.S.A., given said statute in the original majority opinion saves it "against the constitu-

See note on page 816

tional impediment suggested by Professor Day and Judge Shannon" it, in our judgment, renders said statute unconstitutional for a reason other than the one recited by these erudite expositors of the law. This is so because the view set forth in our original opinion that F.S. Section 95.23, F.S.A., is a bar or estoppel causes said statute to operate indirectly in a manner in which it does not "purport" to act directly, i.e., makes valid, by virtue of delay and mere passage of time, a deed which was and is void. We can see no difference between a statute which might "purport" directly to make valid a deed which was void at its inception, and one which bars a person from asserting the validity of such instrument after sheer expiration of a given period of time **with no change** in conditions or circumstances. The end result is the same. In either event, an heir's constitutionally created interest in homestead property is destroyed under the impact of the statute, by the mere existence of a void deed.

W proceed now to a discussion of our opinion and decision in Thompson v. Thompson, Fla., 1954, 70 So.2d 555. We have examined the file lodged in the Clerk's office and have made a careful analysis of the opinion in Thompson. Although the contention was made by appellants that the critical deed was **void**, we are now convinced that we gave, at most, only superficial consideration to such point. The opinion fails even to discuss it and disposes of it only by necessary implication.

It is stated in said opinion that the bill of complaint contained no allegations of "fraud" while in truth and in fact it was bottomed upon an alleged fraudulent **and** invalid transaction. The bill clearly charges that the vol-

untary deed from the husband to the wife was executed and delivered without anything of value passing from the latter to the former. Admittedly this trick was devised for the purpose of vesting the title in Mrs. Thompson in a futile effort to "divert his (Thompson Sr.'s) creditors". The bootless scheme was conceived in iniquity, reeked of fraud and was invalid. Thompson, Sr. might have been estopped in a court of equity from taking advantage of his own wrong but our opinion fails to state that our decision was based upon such theory. F.S. Section 95.23, F.S.A., was held applicable and that was the end of the line.

Actually we relied in Thompson upon our decision in Barnott v. Proctor, supra, which concededly involved the rights of an innocent third party. It, therefore, was not dispositive of the controlling, although unrecognized, query in the Thompson case. Except for the lightly considered opinion in Thompson, this Court has never held F.S. Section 95.23, F.S.A., to be applicable, so far as we have been able to discover, to a void deed or in any action in equity containing a factual picture similar to the one limned by the record herein.

In our opinion, the simple, correct and direct method of clarifying our conflicting decisions upon the vital and controlling question posed in this case is to, and we do herein and hereby, repudiate our opinion and decision in Thompson and hold in line with prior decisions of this Court that the critical deed is void. It is unthinkable, in any event, that a court of equity would permit George Reed to take advantage of his own wrong. How can it be said that Mrs. Fain cannot maintain this equitable action

even if it be held that the putative deed[8] to George Reed was not absolutely void ab initio, in the face of the fact that no rights of innocent third persons are involved? Actually, the only **real** interested parties litigant are Mrs. Fain and George.

[13] It should not be held that this action in equity by Mrs. Fain is barred by estoppel, laches or a statute of limitation which is basically predicated upon either rule. This suit in equity is not one in which equity and law have concurrent jurisdiction. The statute is not by express language made applicable to deeds, mortgages and wills relating to homestead property. The basis of the instant action was not originally a demand cognizable in, and enforceable only by, a court of law. George Reed, according to the Chancellor, failed to show, although he alleged, that intervening equities favored his position or that he was prejudiced by unreasonable delay.[9] A statute of limitation may, of course, be employed as a guide in an equity action in connection with a careful consideration of all of the existing equities.

[14] It is well established that the recordation of a void deed does not constitute constructive notice of "anything". Wright v. Blocker.[1] See also Poladian v. Johnson, Fla., 1955, 85 So.2d 140. It is a mere brutum fulmen "Signifying nothing."[10]

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[8]We hold, however, as aforestated in line with our opinions and decisions in Rawlins v. Dade Lumber Co., 80 Fla. 398, 86 So. 334; Bigelow v. Dunphe, 143 Fla. 603, 197 So. 328, that said deed was and is void for all purposes.

[9]"Effect of Statute of Limitations in Equity Suits." See the excellent dissertation upon the subject by George Earl Brown, published in the U. of F. Law Review, Vol. 3 (1950), page 351.

[1]See note 1 on page 864.

[10]Macbeth, Act V, Sc. 5.

Moreover, it has been held by this Court (Anderson v. Northrop, 30 Fla. 613, 12 So. 318) under facts analogous to those of the instant case that a **fraudulent** deed (voidable only as distinguished from void ab initio) although recorded, did not constitute constructive notice to those against whom the fraud was perpetrated. More accurately speaking we held the failure to examine the records as well as the delay in bringing suit to set aside such recorded deed was excusable and that laches could not be employed as a defense.

We paraphrase the language of our opinion in Anderson. "The possession by [Mr. and Mrs. Reed] of the [homestead] property, being entirely consistent with, and permitted by, the title by which [Mrs. Fain] could claim only at [J. M. Reed's] death, was of itself calculated to deter [Mrs. Fain] from inquiring for any other title, not consistent therewith, and furnishes a natural, and, as we think, sufficient, excuse for [Mrs. Fain's] failure to examine the records. And in this connection it may be said that the continued absence from the state of [Mrs. Fain] and [her] consequent want of access to the records, and to the knowledge of the transactions that might have been general in the immediate community, [general knowledge is at least doubtful in this case] is a circumstance that should weigh in favor of [her] want of knowledge on the subject."

"Suppose [she] had applied earlier for the relief now sought. What would have been the result of the litigation? Clearly, * * * no litigation over [the homestead property] instituted prior to the death of [both J. M. and Stella Reed] could have resulted in dispossessing [either parent] of [the homestead property] * * *, nor could it have re-

sulted in an immediate enjoyment of any of such property by [Mrs. Fain] until after the termination of [the] natural life [of each parent]." This is so because J. M. and Stella Reed had the right of possession of the homestead property until the death of J. M. Reed, and Stella Reed, as widow, had such right thereafter by virtue of the life estate which vested in her by operation of law.

Mrs. Fain did not, according to the record before us, have actual notice of the critical deed executed in the year 1930 until 1955, or perhaps 1951. She testified positively that she first had actual knowledge concerning the 1930 transaction between Gorge and their parents in 1955. Later on she gave testimony which indicated she might have learned about the 1930 deed in 1951[11] had she inquired into the reason for George's insistence that she execute a quitclaim deed to him. However, equity should not require a sibling, positioned as was Mrs. Fain, to be ever vigilant and alert to discover and prevent chicanery on the part of other members of her family designed to deprive her of her sacred birthright.

Assuming that 1951[12] was the year in which Mrs. Fain learned about the attempt to destroy her constitutionally created interest in the homestead property, she has not been guilty, under the facts disclosed by the record, of unreasonable or inexcusable delay which resulted in prejudice to any (fancied) rights of her brother George. No normal child would even question or investigate the propriety or legality of his parents' action much less bring

[11]Mrs. Fain came to Florida from her home in Texas in 1951 because of her father's serious illness.

[12]In 1951 Mr. and Mrs. J. M. Reed were well along in years and Mr. Reed was quite ill both physically and mentally.

a suit against them, at any time, especially during the evening tide of life, and take the chance of disrupting or destroying the cordial parent and child relationship which should ever remain inviolate. The biblical admonition to "Honour thy father and thy mother"[1] would be sufficient justification for the adoption of a Fabian policy

[15] Summarizing, we hold that F.S. Section 95.23, F.S.A., is not applicable in this case because, first, the critical deed is void, second, if not void ab initio, it was and is void as to Mrs. Fain's "inchoate" interest in the homestead which became "vested" upon the death of her father; third, the Legislature did not intend F.S. Section 95.23, F.S.A., to be applicable to deeds or wills conveying or devising "homestead property"; fourth, F.S. Section 95.23, F.S.A., is unconstitutional if it be construed in such manner as to breathe life into an instrument made and executed in contravention of **constitutional** inhibitions.

We expressly recede from our decision in Thompson v. Thompson, Fla., 1954, 70 So.2d 555. We also repudiate any statement in our opinion in the later case of Moyer v. Clark, et al. Fla., 1954, 72 So.2d 905, which might be considered as a reaffirmance of our decision in Thompson.

The decision of the District Court of Appeal, Second District, is hereby

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[1] Exodus XX. 12.

Affirmed.

ROBERTS, C. J., and THOMAS and DREW, JJ., concur.

TERRELL, THORNAL and O'CONNELL, JJ., dissent and adhere to former opinion and judgment filed November 1, 1961.